Legal Officers Section
2005 IACP Conference
Miami, Florida
September, 2005

42 U.S. Code §1983 – 2005 Updates

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INVESTIGATIVE DETENTION

Turmon v. Jordan, 405 F.3d 202 (4th Cir. 2005)

At 5 am, after unsuccessfully attempting to get heat in his room at the Red Roof Inn, Turmon turned on the hot water. The defendant, Jordan, moonlighting as a security guard in his police uniform, saw what he thought was smoke billowing from the room. As Jordan approached Turmon, Turmon closed his door and got back in bed. Jordan then thought that the occupant was trying to burn the building down, trying to hurt himself or someone else, or trying to cover something up in this high crime area. He ordered the plaintiff to open the door. When Turmon opened the door, Jordan pointed a gun in his face, grabbed him, jerked him outside and handcuffed him. When Turmon told Jordan he was a retired state trooper, Jordan removed the handcuffs and released him.

The Court found that Jordan did not have reasonable suspicion for this investigative detention. By the time he reached the room there was no smoke, no flames and the fire alarm system had not gone off. When the door was open it was obvious there was no fire. The officer had no reasonable suspicion to believe that any violation of the law was occurring.

The Court also found that the officer's use of force was unreasonable. It commented that drawing a weapon is an extraordinary measure that can be justified as a reasonable means of neutralizing potential dangers. Applying Graham v. Connor analysis it would be clear to a reasonable officer that he could not point his gun at an individual, jerk him from his room and handcuff him when there was no reasonable suspicion that a crime had been committed, and no indication that the individual posed a threat to the officer, or any indication that the individual was attempting to resist.

Polk v. Hopkins, 129 Fed.Appx. 285 (6th Cir. 2005)

Upon receiving a telephone call from her sister that there was something wrong with their mother, the plaintiff began to drive to her sister's house to pick her up to continue on to their mother's. Hopkins, using his radar gun, clocked Polk driving 76 miles per hour in a 45 mile per hour zone. He followed her, never coming closer than 100 yards, and observed her slow down for a stop sign and then speed up to 60 miles per hour in a 25 per mile an hour zone. Polk claims she did not see Hopkins until she got out of her car at her sister's house at which point she observed a semi-marked police vehicle and began to walk toward it. The officer exited his car with his gun drawn and yelled at her to get on the ground. Her sister and a neighbor, who knew

the officer, were outside when she put her hands up and looked around for a dry place on the ground. She claimed that, after dropping to her knees, she was pushed to the ground, the officer put his foot on her upper back, grabbed her hands and handcuffed her. He then jerked her up by the handcuffs and pushed her into the car. She was issued a ticket for reckless driving and then allowed to proceed to her mother's.

The Appellate Court affirmed the summary judgment on behalf of the officer on the false arrest claim finding the excessive speed was sufficient to establish a "fair probability" that Polk had committed reckless driving, which is punishable by up to 93 days in jail. The Court determined the officer's actions amounted to an arrest by placing Polk in the police car and handcuffing her, actions which were not reasonably necessary for investigative purposes. The Court reversed the summary judgment on the excessive force claim finding that some of the actions taken occurred after the plaintiff was already lying flat on the ground and after she was handcuffed. At these points there was no evidence that she presented a threat to the officer or to anyone else and there was no governmental interest in using unnecessary force after she had been neutralized.

Fisher v. Harden, 398 F.3d 837 (6th Cir. 2005)

The plaintiff, a seventy-seven year old retired farmer, went out to shoot groundhogs. He positioned himself sitting in a folding chair on an elevated railroad grade. A passerby, thinking he was possibly suicidal, called the Sheriff's Department. The officers used a microphone and instructed the plaintiff to come toward them. He complied and also complied when the officers told him to put down his gun and, later, when he neared the officers, to lie down on the ground. When the officers handcuffed him, he went into cardiac arrest, which resulted in a permanent disability.

It was argued that the officers violated his Fourth Amendment rights when they arrested him without probable cause required to justify a mental health seizure. The officers argued and the District Court agreed that the officers merely conducted a Terry stop and that they had reasonable suspicion to believe that this individual may have presented a danger to himself or others.

The Appellate Court did not agree, stating that in the Circuit, absent criminal activity, an officer may not physically restrain an individual merely to assess his mental health. The Court cited cases from the Second, Fourth, Fifth, Seventh, Eighth and D.C. Circuits, all agreeing that the standard for a seizure of someone with mental health problems is probable cause to believe that the person is dangerous to himself or others. The facts of this case did not demonstrate the requisite probable cause standard. Fisher did not do anything that the officers considered suspicious or threatening and complied with the officers' requests. There was no danger after complying with the officers' requests to lay down his gun and the officers never even questioned him with regard to potential depression or suicide. Even if reasonable suspicion were the standard for detaining someone with mental health problems, the rule would not apply in this case because the force used by the officers elevated a seizure from a mere investigative stop to an arrest.

Denver Justice & Peace Committee, Inc. v. City of Golden, 405 F.3d 923 (10th Cir. 2005)

The Golden City officers executed a search warrant on the plaintiffs' business looking for papers, posters, videotapes, and other First Amendment materials related to a vandalism offense, which occurred during an organized protest at Cole's Department Store. When Espinosa entered the office he was approached by two officers and explained to them that he was the administrator of the office. They conducted a pat down search of Espinosa without his consent although they did not pat down any of the other individuals who were present when the search commenced. The District Judge denied the motion to dismiss based on qualified immunity, determining there was no evidence to support reasonable suspicion that Espinosa was armed. The defendants argued that for reasons of officers' safety and general efficiency in executing a lawful search warrant, police should have the authority to frisk persons who enter an area where a search warrant is being executed even without such reasonable suspicion. The Court stated that it has never articulated such a principle and refuses to do so now.

After discussing the law of Terry and Ybarra, the Court went on to note other cases where they have found pat downs to be invalid, including the pat down frisk of an individual who was present at the site of a suspected meth lab, the pat down of an occupant at a home of an individual with probable cause to believe he was committing a federal offense. The defendants attempted to support their actions citing Michigan v. Summers, Muehler v. Mena and a 10th Circuit case of United States v. Ritchie.

In distinguishing Ritchie, they noted that the search of that property was related to an armed robbery and Ritchie was suspected as being the armed robber. In this case the warrant was for the search of offices. There was no reason to believe that Espinosa was involved in the incident and the search was for First Amendment protected materials.

Summers authorized officers to detain occupants of a premises during the course of a search but the Court expressly noted that the authorization of a temporary detention did not apply where a warrant authorizes a search for mere evidence at the premises of a party whose possession the materials sought is not a crime. Muehler was also inapplicable since the issue pertained to the detention and handcuffing of an occupant during a search of a house in a gang related shooting. The search in question did not implicate the apprehension of danger or the presence of contraband; rather, the circumstances fell squarely into a factual pattern where a pat down search of an individual would be prohibited, absent reasonable, individualized suspicion.

EXCESSIVE FORCE

Nimely v. City of New York, 414 F.3d 381 (2d Cir. 2005)

Following a shooting at a party outside a rental hall, officers approached plaintiffs in the vicinity of a cabstand. Plaintiff Nimely began to run resulting in a foot pursuit during which the officers claimed he held a gun, which he denied. Nimely apparently hit a fence fell to the ground and began to get up. According to the officers he turned pointing his gun at one of the officers who fired striking him in the chest. Contradictory witness testimony and testimony of medical and procedural experts resulted in a verdict in favor of the shooting officer. Although it was clear

Nimely was shot in the back the evidence presented did not exclude the possibility that he may have been turning toward the officer with a gun in his hand at the moment of the shooting.

"An officer's decision to use deadly force is objectively reasonable only if the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officers or others. …the reasonableness of the officer's decision to use force in effectuating a seizure depends only on the officer's knowledge of circumstances immediately prior and at the moment that he made the split-second decision to employ deadly force." (Citations omitted.)

The jury apparently believed the officers contention that the Plaintiff was turning toward them at the time of the shooting in finding for the Defendant officer. The police expert's testimony as to the tendency of police officers in general and the defendant officers in particular not to lie in excessive force investigations was erroneously admitted resulting in the appellate court ordering a new trial.

Parks v. Pomery, 387 F.3d 949 (8th Cir. 2004)

At about 9:30 p.m. after returning from a bar/restaurant where Parks had consumed three 22oz. mugs of beer, he and his wife began to have an argument that resulted in her calling the police. The defendant officers responded to the dispatcher's report of "Husband/wife. Male is [drunk]. No weapons. It's not physical at this point, but it sounds like it might get there." Upon the arrival of Officers Gottstein and Pomeroy Parks had calmed down. When told he would have to leave the house, Parks responded no and that he didn't do anything wrong. Gottstein who is 5'5'' and weighed approximately 170lbs lunged at Parks who is 5'11'' and weighed approximately 220lbs. Gottstein grabbed Parks by the throat and sprayed him with OC spray. They struggled to the floor with Gottstein underneath Parks who remained on his hands and knees. Gottstein said, "I think he's going for my gun", to which Parks responded, "I'm not. I can't see." According to Pomeroy he saw Gottstein's hand on the grip of his gun with Parks hand partially on the grip and partially covering Gottstein's hand with the gun partially withdrawn from the holster. He twice attempted to fire his weapon but in malfunctioned. He performed the malfunction drill banging the bottom of the gun magazine with his hand before firing the fatal shot. Approximately three to four minutes elapsed from the time the officers arrived at the home until the shooting.

The Appellate Court reversed the District Court's denial of summary judgment based on qualified immunity. It found that there was no dispute that Gottstein's gun was just inches from Parks hand during a physical struggle that was hostile and intense under extremely volatile circumstances that were potentially deadly and the events were evolving rapidly. Given the state of the law at the time and the particular facts of the case Pomeroy did not violate a clearly established Constitutional right.

Harris v. Coweta County, Georgia, 406 F.3d 1307 (11th Cir. 2005)

The Court upheld the denial of qualified immunity for the Defendant Officer who rammed the suspect vehicle. The Plaintiff was pursued for approximately nine miles in 6

minutes. The pursuit started when Harris failed to stop after being observed driving 18 mph above the speed limit. During the pursuit he drove at speeds between 70 mph and 90 mph committing numerous motor vehicle violations but always in control of his vehicle including using his blinkers when turning. At one point his vehicle made minor contact with a police cruiser. The Defendant, Officer Scott, requested and received permission to perform a PIT maneuver. Because the vehicle was traveling too fast, he instead rammed Harris's vehicle rendering Harris a quadriplegic.

Applying Tennessee v. Garner, 471 U.S. 1 (1985) and Brower v. County of Inyo, 489 U.S. 593 (1989) the Court concluded that ramming the vehicle constituted excessive force. They distinguished this case from Brosseau v. Haugen, 125 U.S. 596 (2004). In Brosseau the officer had arguable probable cause to believe that the suspect posed an imminent threat of serious physical harm to the officers and citizens in the immediate area. Haugen was a suspected felon with a no bail warrant for his arrest. The officer had a violent physical encounter with Brosseau prior to his beginning to drive away with others in the immediate area who may have been subjected to harm. In the instant case the Plaintiff was wanted for speeding and attempting to evade arrest for that charge and there was no evidence that others in the immediate area were being subjected to the imminent threat of serious physical harm.

The supervisor who authorized the PIT maneuver was entitled to immunity because he did not authorize the ramming. The PIT maneuver which was authorized, was described as a driving technique designed to stop a fleeing motorist safely and quickly by hitting the fleeing car at a specific point on the vehicle, which throws the car into a spin and brings it to a stop. It is intended to be performed at low speeds on wide straightaways, on dry pavement by a properly trained driver.

Craighead v. Lee, 399 F.3d 954 (8th Cir. 2005)

At about 9:10 and 10:15 in the morning Scott shot and killed two individuals in separate incidents. In both shootings, the description of a black male was dispatched to officers. Moments after the second shooting was dispatched, Scott attempted to force Craighead to give him a ride. Craighead grabbed Scott and was able to wrestle the gun away from him. A 911 call resulted in the dispatcher informing officers that two black males were struggling for a gun and then reported that one of the men took the gun away from the other. Although Officer Lee testified that he did not hear this second dispatch the plaintiff claimed that given the time sequence he would have either heard it while sitting in his cruiser or on his packset. Another officer in his vehicle, approximately three to four car lengths away, stated that although he saw the men wrestling with the gun, and started to open his door, he did not see the shooting but only heard the blast of Lee's shotgun before he could get out.

According to the plaintiffs, Craighead held the gun over his head, pointed upward, holding the gun away from Scott who was much shorter. They further claimed that Lee knew that one of the two men was a victim and that Lee fired his shotgun within three seconds of exiting his squad car without issuing any warnings or commands under circumstances under which a trained shooter would know that the shot would hit both men.

Accepting the plaintiffs' version of the facts, the Court affirmed the denial of summary judgment on the issue of qualified immunity. The Court held further that under the facts, they were required to assume that Craighead did not pose a significant threat of death or serious physical injury to Lee because the pistol was continually pointed over Craighead's head and Lee fired the shotgun in circumstances in which he knew or should have known that he would hit both Craighead and Scott. In addition, the facts indicate that the warning was feasible, but not given.

Young v. City of Providence, 404 F.3d 4 (1st Cir. 2005)

Two Providence officers, Solitro and his FTO Saraiva, responded to a call at 1:43 a.m. regarding females fighting at a restaurant. As the officers drove up, they saw a man, Diaz, running toward a Camaro, which he entered. They saw him point a gun out the window and Solitro said "gun" which was the only word exchanged between them the entire incident. Saraiva took cover behind some poles, while Solitro took cover behind the engine block of the cruiser. Both yelled commands at Diaz to drop the gun and get out of the car. As Diaz started getting out the car, they could see that he no longer had the gun in his hands. Solitro moved from behind cover because he found the cover to be imperfect, wanted to get a better look at the Camaro, and wanted to make a rapid arrest of Diaz. Plaintiff's expert testified that leaving cover was inconsistent with accepted police practices as it made Solitro more vulnerable.

Cornell, an off-duty Providence officer inside the restaurant, left the restaurant acting pursuant to the "always armed/always on-duty" policy of the department. Civilian witnesses reported that they believed he was a police officer as he was holding a gun and screamed, "freeze". The on-duty officers testified that they yelled "drop the gun" or "drop it" before both officers shot multiple times killing him. The jury found Solitro but not Saraiva to have violated Cornell's constitutional rights.

On Appeal the defendants challenged the verdict against Silitro arguing that plaintiff's expert testimony with regard to leaving cover was erroneously admitted. The Court did not agree, finding that the rule in the 1st Circuit is that once it is clear that a seizure has occurred, the court should examine the actions of the government official's leading up to the seizure. Police officer's actions need not be examined solely at the moment of the shooting. The Court upheld the verdict finding that there was evidence that Cornell was identifying himself as an officer, was holding a gun with two hands as an officer would do and was immediately recognized by bystanders as an off-duty officer. There was also evidence that Cornell's gun was pointed downwards and that the officer shot him extraordinarily quickly, almost immediately after he left the restaurant and without giving him adequate warning.

McVay v. Sisters of Mercy Health System, 399 F.3d 904 (8th Cir. 2005)

Sears, a police officer, worked as a security guard for St. Joseph's Mercy Health Center. He wore his police uniform, gun, and badge and carried handcuffs. Sometime after McVay was left at the hospital for alcohol withdrawal, including disorientation and lack of mental control, he wandered from his room. Sears found him after he had pulled out his intravenous tubes and appeared to be talking to imaginary people. When he tried to bring him back to his room,

McVay ran attempting to get out of an exit that had two sets of doors, the outer of which were locked. When he ran for the doors, Sears tackled him causing McVay to fall to the floor resulting in a subdural hematoma leading to his death eight days later.

The Court affirmed the District Court's grant of summary judgment finding that under the circumstances with McVay barreling toward glass doors, that Sears knew would not open, and the risk that McVay in his impaired state might have crashed into the glass potentially injuring himself, that the officer acted in an objectively reasonable manner tackling McVay to the ground.

Baldwin v. Placer County, 405 F. 3d 778 (9th Cir. 2005)

Officers from the Marijuana Eradication Team (MET) executed a search warrant believing that the plaintiffs, a 35 year old dentist, 5'9" inches tall and weighing 165 lbs, and his wife, 34 years old, 5'5" tall and weighing 125 lbs, were growing marijuana. Five officers executed a para-military style entry, without knocking. They encountered the dentist as he came into the house from the back door, pointed a gun at him and ordered him to lie down. The officer then pushed the gun to the rear of his head and placed his knee in his back. His wife, dressed only in a t-shirt and cotton briefs, opened the bedroom door to be confronted with someone pointing a flashlight at her, pushing their fingers into her throat, forcing her into the bedroom and telling her to get on the floor, with a gun pointed to her head, while an unidentified gunman kneed her in the small of her back and handcuffed her.

The Court ruled that the use of force was not objectively reasonable, that the officers could not have believed that there was any exigency as there was no reason to believe that the plaintiffs would resist or flee, they had no criminal history, nor was there any reason to believe they were armed. Further, poking fingers into the throat of the wife constituted a separate battery. The Court referred to the government's interest in using handcuffs while executing a warrant authorizing a search for weapons and a wanted gang member, Muehler v. Mena, 125 S.Ct. 1465 (2005), versus the government interest in conducting a search where there is no belief that weapons will be found and the occupants of the house, are in fact, a dentist and his wife.

Mercado v. City of Orlando, 407 F.3d 1152 (11th Cir. 2005)

Upon arrival at the Mercado home in response to a domestic, officers found Mr. Mercado sitting on the kitchen floor, crying, with a knife in both hands pointed toward his heart and a telephone cord wrapped around his neck. After ordering him in English and Spanish to drop the knife, Officer Padilla followed Rouse's order to hit Mercado with a Sage and then with an SL6 Launcher (less lethal munition, fires polyurethane baton 1.5 inches wide designed to leave bruises), hitting Mercado once in the head resulting in brain injuries.

Applying Graham, the Appellate Court overturned the District Court's grant of qualified immunity to the officers. The Court determined that he was not committing a crime, resisting arrest or posing an immediate threat to the officers. By aiming at Mercado's head, Padilla used excessive force because he was trained on how to use the Sage Launcher - the weapon accurately hits targets at distances up to five yards - and Padilla was aware that the launcher was a lethal

force if shot at a suspect from close range. Furthermore, the officers were aware that alternative actions such as using a crisis negotiation team were available, and recommended under policy; especially when Mercado was not making any threatening moves toward himself or the officers.

Even though there was no specific case law that would put Padilla on notice that his actions violated clearly established law, the court found that he was not entitled to qualified immunity because he was aware that police policy forbid him from using deadly force under the circumstances. Simply put, he used deadly force in violation of the clearly established principal, that deadly force cannot be used in non-deadly situations. "…this is one of the cases that lie so obviously at the very core of what the fourth amendment prohibits, that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of case law. The facts in this case are also so far beyond the hazy border between excessive and acceptable force that the official had to know he was violating the constitution even without case law on point." (citations omitted.)

Note: Under Florida law, deadly force does not include the discharge of a firearm by an officer loaded with less lethal munition. Less lethal munition is defined as, "a projectile that is designed to stun, temporarily incapacitate, or cause temporary discomfort to a person without penetrating the person's body."

Holmes v. City of Bastrop, 141 Fed.Appx. 315 (5th Cir. 2005)

The Court upheld the District Court's granting of summary judgment on plaintiff's excessive force claim. Plaintiff, who was suspected of possessing narcotics, attempted to flee from the officer by jumping on a train. He alleged that the officer used excessive force in grabbing him to prevent his escape, thereby causing him to fall beneath the train severing both his legs. The Court found that the District Court was not bound by the opinion of plaintiff's expert on his unreasonableness and Holmes did not demonstrate an issue of material fact sufficient to survive qualified immunity.

Hanig v. Lee, 415 F.3d 822 (8th Cir. 2005)

Sixteen-year-old Hanig was arrested by Officer Lee for skateboarding in a parking lot. A senior officer testified that Officer Lee improperly applied handcuffs causing pain and severe bruising to Hanig. In the Eighth Circuit Court Appeals an actual injury must be shown to support an excessive force claim under the fourth amendment. Even though Hanig's surgeon's opinion that he suffered a 1.3% permanent impairment was based only on Hanig's subjective complaints, there was no surgeon's opinion to contradict this testimony. Therefore the Court affirmed the jury's award of $153,000.00 in damages.

Marquez v. The City of Albuquerque, 399 F.3d 1216 (10th Cir. 2005)

Police began to pursue a vehicle that refused to pull over for a non-functional license plate lamp. During the pursuit they learned this vehicle had been involved in a burglary earlier that night. After the vehicle struck a wall the first officer, Defendant Lehocky, testified that the Plaintiff passenger Marlo Marquez exited the car ignoring his command to stop. He ordered his

dog to apprehend the suspect and Bart being the obedient servant complied latching firmly onto Marquez. Meanwhile, Cynthia Perkins, the driver, attempted to drive away. Officer Heshley ordered Perkins out of the vehicle and when she complied Lehocky removed Bart from Marquez. A jury returned a verdict for the Defendants.

The Court noted that the first, sixth, and ninth circuit Court of Appeals had ruled that the use of a police dog is not considered deadly force. Because neither party raised this issue, the Court assumed that use of a police dog is not deadly force ipso facto.

The first question was whether the use of the dog was objectively reasonable. The Court found it was because first, it was reasonable for the officer to believe that he was faced with two potentially armed burglary suspects (the officer testified that between one quarter and one half of all robbery suspects are armed). Second, the high-speed chase demonstrated that the driver was a danger to the public and was willing to evade arrest. Third, Marquez attempted to evade arrest by running away and trying to climb a fence. Finally, at the time of the arrest, Lehocky was the only officer at the scene attempting to secure two felony suspects.

The second issue pertains to the exclusion of the Plaintiff's expert's testimony. The expert, George Kirkham, intended to testify that the only reasonable use of force is the minimum use of force and as to what constituted well-established law enforcement standards. The Appellate Court found that the District Court did not err in concluding that his testimony was irrelevant and confusing. Testimony regarding the minimum use of force is irrelevant, as the Fourth Amendment does not require police officers to use the least intrusive amount of force. The exclusion of the testimony regarding law enforcement standards was also appropriate as violations of state law and police procedure generally did not give rise to a §1983 claim for excessive force. The only issue before the jury was whether Lehocky acted as a reasonable officer when he ordered his police dog to apprehend Marquez, therefore, the Court did not abuse it's discretion in excluding the testimony of Kirkham.

Finally, the Court did not err in refusing to have evidentiary ruling on the "expert juror issue." One of the jurors was accused of holding herself out as an expert in police dog training asserting that police dogs did not bite unless the suspect is fleeing. The injuries suffered by Marquez were not serious and police dogs do not bite the first part of the body they come across. The Court agreed with the District Court that the juror only referred to her own personal experiences, which are not generally considered extraneous prejudicial information. Regarding such issue, the proper inquiry is whether the jurors discussed specific extra – records facts related to the Defendant, and if they did, whether there was a significant possibility that the Defendant was prejudiced thereby.

Smith v. City of Hemet, 394 F.3d 689 (9th Cir. 2005)

Smith's wife called the police reporting that her husband had hit her, but had no weapons and was dressed in pajamas. Officer Reinbolt approached Smith standing on his front porch, told him to take his hands out of his pajamas, but was met with expletives. After several more refusals to remove his hands from his pockets, he entered his home. He then reemerged onto the porch, complied with further instructions to remove his hands, but refused to put his hands on his

head and walked toward the officer. Another officer arrived and requested additional assistance including a canine unit. At least four officers were present when Smith, still refusing to turn around and place his hands on his head, was pepper-sprayed. The officers grabbed him from behind, slammed him against the door, threw him down on the porch and the canine was ordered to attack him. "Quando" bit Smith on his right shoulder, and the neck area and arm. Smith then agreed to comply and curled up in a fetal position in an attempt to shield himself from the dog. He was dragged off the porch face down followed by another order to Quando to bite Smith, to which she complied by biting Smith's buttocks. While this was occurring Smith was sprayed at least four times. The officers washed out his eyes, but not his wounds. Smith plead guilty to willfully resisting and obstructing an officer.

Defendants moved for summary judgment arguing that plaintiff's allegations were barred by Heck v. Humphrey, and that their use of force was objectively reasonable.

Heck v. Humphrey:

The Court denied the motion, which argued that the conviction for resisting barred the use of force claims. First, the Court determined that excessive force used by a police officer at the time of the arrest is not within the performance of the officer's duty. Second, the Court determined that success in the civil suit would not invalidate the conviction since Smith committed the crime prior to the use of excessive force. The Court determined that by refusing to take his hands out of his pockets, reentering his home, repeatedly refusing to put his hands on his head, and coming down off the porch and finally refusing to put his hands on his head and turn around, that each of these acts constituted a violation of the criminal statute. Since there was nothing in the record to inform the Court as to the factual basis of the plea, they determined that the lawsuit did not necessarily imply the invalidity of his conviction and therefore the suit was not barred by Heck.

Excessive Force:

In applying Graham under the investigative facts, the court determined that Smith was not a particularly dangerous criminal. Although domestic violence is reprehensible, at the time Officer Reinbolt arrived, he was standing on his porch alone, separated from his wife, had no guns or other weapons and the nature of the crime (hitting his wife and grabbing her breast very hard) provided little basis for the officer's use of force.

Second, the record does not reflect that he posed an immediate threat to anyone's safety. For most of the incidents he was in plain view and before the force was used, he did remove his hands from his pajama pockets. The defendants conceded in depositions that Smith did not pose a significant threat of death or serious physical injury and one officer stated that he made no threats, verbal or physical, toward him or anyone else. With regard to his act of resistance, he continually ignored the officer's requests, reentered his home for only a brief period, and did not attempt to run from the officers. To the extent that he did physically resist, this lasted for only a brief time. There was no evidence that he attacked the officers or their dog, nor did it appear that his resistance was particularly bellicose.

Definition of Deadly Force / Use of Canine:

The 9th Circuit reversed itself and adopted the use of deadly force used in the 7th Circuit (3rd, 5th, 6th, 7th, 8th, 10th, 11th Circuits and 50 states plus the District of Columbia and Puerto Rico which followed the model penal code definition, including, "a substantial risk of serious bodily injury.")

Finally, the court did not determine whether the use of a police dog to subdue a suspect constituted deadly force generally, nor did it determine under what circumstances the dog might constitute deadly force. Instead, the Court left this determination to the District Court.

New v. City of San Antonio, 139 Fed.Appx. 631 (5th Cir. 2005)

Officer Wang observed three males turn into a driveway of a known crack house. He believed he saw the driver make a quick drug transaction and stopped them for questioning. The driver's name came through with two outstanding warrants. While handcuffing the operator, the plaintiff, Allen New, began digging into his back pockets. He complied when the officer told him to place his hands on the dashboard, but when the officer looked away, he again reached into his back pockets. After his second command was ignored, Wang jumped into the front seat to attempt to restrain Allen. Trumaine, Allen's son, joined in on the struggle, resulting in a call for backup and a subsequent subduing of the father and son. Allen and Trumaine characterized the beating as being unprovoked leaving one with a swollen eye and broken nose and the other with compacted teeth.

After denial of summary judgment, a jury returned a verdict in favor of Officer Wang. The court set aside the judgment and ordered a new trial based on the manner in which evidence with regard to the finding of cocaine in the vehicle was presented to the jury.

Wang claimed to the Appellate Court that the District Court's grant of a new trial negated the jury's finding of qualified immunity and therefore the Appellate Court had jurisdiction. The Appellate Court determined that because a discretionary call is not a pure matter of law, the appeal had to be dismissed.

FALSE ARREST/MALICIOUS PROSECUTION

Cooper v. Dillon 403 F.3d 1208 (11th Cir. 2005)

The publisher of a free weekly newspaper in Key West, Florida, sued the Police Chief for arresting him for the violation of an unconstitutional statute. The statute, in pertinent part read as follows:

Any person who is a participant in an internal investigation, including the complainant, the subject of the investigation and the subject's legal counsel or a representative of his or her choice, the investigator conducting the investigation, and any witness in the investigation, who willfully discloses any information obtained pursuant to the agency's investigation, including, but not limited to, the identity of the officer under investigation, the nature of the questions

asked, information revealed, or documents furnished in connection with a confidential internal investigation of any agency, before such complaint, document, action , or proceeding becomes a public record as provided in this section commits a misdemeanor of the first degree…."

The Plaintiff was arrested for writing a commentary in his paper about the investigation.

Constitutionality of Statute

The Court began its discussion by citing a number of cases stressing the importance of freedom of the press in guarding against the miscarriage of justice by subjecting government officials to extensive public scrutiny and criticism. The Court then held that the statute was not a prior constraint of free speech because the thread of criminal sanctions was imposed after the publication. However, the Court did determine that the statute was content-based because the purpose of the statute was to stifle speech of a particular content, specifically, speech about pending investigations of law enforcement officers. In order for the statute to be constitutional it must be narrowly tailored to promote a compelling government interest. The Chief argued there were three compelling interests at stake.

1) There is an interest in maintaining the integrity of the investigative process by shielding potential witnesses from information that could alter their testimony. This interest was rejected as a sufficiently compelling justification for content-based restrictions under Landmark Communications, Inc. v. Virginia 435 U.S. 829 (1978).

2) The interest in protecting wrongfully accused officers from defamation was found to be insufficient to sustain the statute. The Supreme Court noted in Landmark that injury to official reputation is an insufficient reason for repressing speech that would otherwise be free. Rather, the proper remedy would be the State's liable laws.

3) The Chief cited safeguarding the privacy interests of targets, witnesses, and complainants in the investigation as a compelling state interest. The Supreme Court precedent also rejected this claimed interest in support of criminal sanctions for the publication of lawfully obtained information. Florida Star v. B.J.F., 491 U.S. 524 (1989). "In a free society, the public's interest of safeguarding the reputations of accused officers reportedly served by statute is not sufficiently compelling to justify the statute restrictions." Because none of the interests were compelling, the Court determined the statute to be unconstitutional.

Chief's Liability in His Individual Capacity

Under a qualified immunity analysis, the Court determined that the Chief should not be held liable as he relied on a statute that he was entitled to assume was free of constitutional flaws. "…police officers on the street are ordinarily entitled to rely on the assumption that legislators have considered views of legal counsel and concluded that the ordinance is a valid and constitutional exercise of authority."

Chief's Liability in His Official Capacity Claim

Under Pembaur, a municipality may be held liable for a single decision by a municipal policy maker under appropriate circumstances. It was not disputed that the Chief, under the City Code, was the ultimate policy maker for police procedures in the City. His decision to enforce an unconstitutional statute was sufficient for § 1983 liability. "Proof that a municipality's… authorized decision maker has intentionally deprived the Plaintiff of a federally protected right necessarily establishes that the municipality acted culpably."

The Chief argued that the City could not be held liable for enforcing an unconstitutional statute which the municipality did not promulgate or adopt. The Court rejected this argument because the City's Ordinances provided that it was unlawful for any person to commit within the City limits any act, which is or shall be recognized by the laws of the State as an offense. The Chief's decision to enforce an unconstitutional statute constituted a deliberate choice that ultimately deprived the Plaintiff of constitutional rights and therefore triggered municipal liability.

Vives v. City of New York, 405 F.3d 115 (2d Cir. 2005)

Vives brought an action claiming, amongst other things, a violation of his First and Fourth Amendment rights in an arrest for aggravated harassment pursuant to the New York Penal Law in connection with his mailing of non-threatening religious and political materials to a political candidate and other people of the Jewish faith which he claimed he sent with the intent to alarm the recipients about current world events prophesized in the Bible. He also challenged the constitutionality of the statute.

New York Penal Law § 240.30 provides in relevant part:

> A person is guilty of aggravated harassment in the second degree when, with intent to harass, annoy, threaten or alarm another person, he or she: (1) Either (a) communicates with a person, anonymously or otherwise, by telephone, or by telegraph, mail or any other form of written communication, in a manner likely to cause annoyance or alarm; or (b) causes a communication to be initiated by mechanical or electronic means or otherwise with a person, anonymously or otherwise, by telephone, or by telegraph, mail or any other form of written communication, in a manner likely to cause annoyance or alarm.

The District Court ruled that although the statute had "never been declared unconstitutional on its face that a declaration of the sections unconstitutionality was inevitable and under the circumstances the officers would have been on fair notice that the arrest of Vives was unconstitutional.

The Appellate Court did not agree stating, "absent contrary direction state officials… are entitled to rely on a presumptively valid state statute… until and unless [statute is] declared unconstitutional… 'the enactment of a law forecloses speculation by enforcement officers concerning [the law's] constitutionality—with the possible exception of a law so grossly and

flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws.'"

Washington v. Wilmore, 407 F.3d 274 (4th Cir. 2005)

In 1982 Williams was raped and murdered, stabbed 38 times and left for dead with her two young children in the apartment. Before she died, she identified her attacker as a black man with a beard. Approximately a year later, Washington was arrested for breaking into an apartment and beating an elderly neighbor with a chair. He stole a gun from her and subsequently shot his brother. After his arrest he confessed to several crimes, including the rape and murder of Williams. Two days later, Agent Wilmore wrote a police report indicating that Washington had pertinent information about the crime that no one knew with the exception of himself. During the interrogation the agent asked Washington if he had left anything at the crime scene and he indicated that he left a shirt. A shirt found at the crime scene with a patch removed from the top pocket was identified by Washington as belonging to him. In late 1993 DNA testing indicated that the semen recovered from Williams contained a genetic marker not possessed by her, her husband or Washington. Based on this evidence the Governor issued a conditional pardon commuting Washington's death sentence to life imprisonment. In May of 1993 Wilmore and his partner, Hart, met with an Assistant Attorney General and told him that they had been troubled for years that Washington's sentence was based only on his own confession without any corroborating evidence, especially because of Washington's limited mental abilities. Wilmore added that either he or Hart must have mentioned the shirt to Washington before Washington said he left the shirt at the scene. In 2000, DNA testing conclusively excluded Washington as a contributor of the semen found and he was granted an absolute pardon.

Washington filed an action claiming that his confession was coerced, that the officers failed to disclose exculpatory information and that the officers failed to investigate other information that would have exonerated him. The Court granted summary judgment on all claims except as to Wilmore, reasoning that Washington had proffered evidence from which a reasonable juror could conclude that Wilmore possessed non-public information about the crime and falsely represented that Washington had volunteered that information during interrogation.

The inquiry was whether Washington's conviction was a reasonably foreseeable result of Wilmore's initial act of fabrication regarding the police report. Because Washington's seemingly independent knowledge of details of the crime was an important factor throughout the history of the case, the Court concluded that the facts stated by Washington alleged a violation of his constitutional rights not to be deprived of liberty as a result of the fabrication of evidence by an investigating officer. "The Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence".

Burke v. Town of Walpole, 405 F.3d 66 (1st Cir. 2005)

The plaintiff was arrested for the murder of a seventy-five year old woman whose body was mutilated in a wooded area. Burke claimed that the police officers violated his Fourth Amendment rights by arresting him in his home without a valid warrant, by arresting him

without probable cause, and claiming the arrest was based on misleading warrant application information with intentional and reckless disregard for the truth.

The warrant was issued under the paperless computerized Warrant Management System. In lieu of a signed arrest warrant accompanied by an affidavit describing the facts, the police presented other documentary evidence and testimony indicating that a warrant was properly issued. Because the plaintiff was unable to produce any evidence demonstrating that no warrant was issued apart from his affidavit stating that he never saw one, the Court determined that the record failed to support his allegation that he was deprived of his constitutional right to be arrested at home only upon issuance of the warrant.

The plaintiff claimed that the arrest was made without probable cause. At the arraignment the day following the plaintiff's arrest, a trooper called a sergeant who was at the courthouse to tell him that the DNA analysis results excluded the plaintiff as a source of male DNA on the victim's left breast. The sergeant alerted the District Attorney who represented to the arraigning judge that the DNA analysis had shown "ambiguous" results and that further testing was required. He then sought detention without bail. While Burke was awaiting release on conditional bail, a comparison of palm prints found on the victim's body against his showed that he was not the source of the print. He was released forty-one days after his arrest. Contrary to this evidence, at the time of the arrest a police canine tracked from the body to the plaintiff's front door, and two independent witnesses saw him outside his house and described the clothing he was wearing. He denied owning such clothing and also changed his story several times with regard to being in the park where the victim was murdered. Also, a national expert in forensic dentistry determined to a reasonable scientific certainty that the plaintiff's teeth matched the bite marks on the victim's breast. The Court determined that this evidence was sufficient to amount to probable cause for the arrest. The Court noted that forensic evidence relied on by police to establish probable cause for arrest need not be unassailably accurate. In many types of forensic analyses, an examiner can do no more than speak in terms of probability.

The misleading warrant application allegation was based on the plaintiff's claims that the warrant included inculpatory bite mark evidence that they knew or had reason to know was inaccurate and excluded exculpatory DNA evidence that would have eliminated probable cause. Because the plaintiff did not dispute the forensic expert's credentials, he failed to establish that the officers had any reason to doubt his opinion, and the plaintiff also failed to establish circumstances that evinced an obvious reason to doubt the veracity of the inculpatory bite mark evidence.

With regard to the exclusion of the exculpatory DNA evidence, the Court found that, given the greater certainty of the DNA analysis, this information was known to the officers prior to the arrest, a reasonable jury could determine that this evidence vitiated probable cause. Forensic lab notes indicated a call to Trooper McDonald regarding the DNA evidence over an hour before he called the arresting sergeant informing him of the dental office approximately four hours before the arrest. Trooper McDonald was not entitled to summary judgment. He argued that he had no constitutional duty to disclose exculpatory evidence prior to Burke's arrest because he was neither an affiant for the arrest warrant nor technically an arresting officer. The Court did not agree, finding that he had a constitutional duty to fully disclose exculpatory

evidence to his fellow officers seeking a warrant based on probable cause. However, the record failed to support any reasonable inference that the officers were not informed of the exculpatory DNA results and would not be entitled to qualified immunity. The Court also found that the private consulting forensic dental expert was both acting under color of law and entitled to qualified immunity. The record revealed no evidence to support an inference that the doctor's methodology or judgment were so clearly flawed that he harbored serious doubts about the reliability of his resulting opinion.

Mathies v. Fritton, 128 Fed.Appx. 787 (7th Cir. 2005)

The District Court denied defendant's motion for summary judgment in a malicious prosecution claim. Defendant officer claimed that he was absolutely immune from suit because the acts for which plaintiff sought to hold him liable were intimately related to the judicial process and taken at the direction of the prosecutor insofar as they consisted of testimony before the grand jury. The Court disagreed, finding that the actions of the defendant pre-dated grand jury testimony, and even if the grand jury testimony was the primary basis for plaintiff's claim, the officer still would not be entitled to absolute immunity.

The Court did find that because the plaintiff never claimed the officer lied before the grand jury, the presumption of probable cause to prosecute raised in the grand jury indictment was not rebutted by Matheis. Holding there was probable cause to prosecute the plaintiff, the Court determined that the officer was entitled to qualified immunity.

Tanberg v. Sholtis, 401 F.3d 1151 (10th Cir. 2005)

Two women sued the defendant officer for false arrest and excessive force. The jury found in favor of the officer, on the excessive force and assault and battery claims, and the Court directed a verdict on the false arrest claims. The Court determined that the officer's violation of the department's off-duty arrest policy was irrelevant to the false arrest claim. Plaintiff argued that the evidence related to the department's policy was relevant as to the excessive force and assault and battery claims. He appealed the Court's grant of the defendant's motion in limine for exclusion of evidence of the department's policies, because they were irrelevant to the federal claims and likely to cause jury confusion regarding the state claims.

Plaintiff attempted to introduce two types of evidence related to the policies;

First, they attempted to admit portions of the policies to solicit their expert's opinion as to whether the officer's actions conformed to the department policy. In particular, the use of force policy stated, "where force is warranted, officers should assess the incident and are to determine which technique or arrest will reasonably de-escalate the incident and bring it under control safely. Officers shall use only that force which is reasonable and necessary to effect lawful objectives." The Court found to the extent that the first half of the policy requires an assessment of an officer's choice between various techniques for de-escalation that this test is beyond the scope of the inquiries mandated by state and federal law. Under law, officers are required to use reasonable force. "The reasonableness standard does not require that officers use alternative less intrusive means… to rule otherwise would be evaluating the officer's conduct from the 20/20

perspective of hindsight rather than from the perspective of an officer making split-second judgments on the scene." The second half of the policy merely implicated the applicable legal standards.

The Court noted that another reason to exclude the policy was the Supreme Court's recognition that local police regulations should not be a standard for evaluating the constitutionality of police conduct, because to do so would invalidate actions in jurisdictions with different practices. (citing Whren v. United States). Finally, the Court noted that if the courts treated administrative standards as evidence of constitutional violations in damage actions under Section 1983, it would create a disincentive to adopt the progressive standards.

Plaintiffs also sought to admit evidence regarding the department's internal evaluation and response to Officer Sholtis' conduct. The Chief followed the recommendation of internal affairs to discipline the officer for making an impermissible off-duty arrest, and for excessive force. A committee subsequently reversed his decision. The Court ruled that to admit this evidence would be confusing to the jury and require needless testimony.

The plaintiff also argued that because the officer's expert testified repeatedly that he conformed to his training, the door was open to test the expert's opinion on cross-examination regarding the department's policies. Although the court initially agreed with this in the morning, by the afternoon it changed its mind and determined that the introduction of such evidence also presented a significant danger for jury confusion. In a footnote, the court recognized that the record did not show that the policies formed part of the officer's training.

Finally, the plaintiffs sought to introduce evidence of other incidents including three other occasions where the officer allegedly arrested individuals without probable cause or used excessive force. The trial court granted the officer's motion to preclude this evidence on the ground that it was both irrelevant and highly prejudicial. Plaintiffs' argument was that the evidence was relevant to show the officer's intent. Because the officer's state of mind is irrelevant to both the false arrest and excessive force claims, which are determined on an objective standard, this evidence was properly excluded.

Dibella v. Borough of Beachwood 407 F.3d 599 (3rd Cir. 2005)

An officer contended that while they were politically campaigning on public property, the plaintiffs were improperly approaching automobiles and their signs were blocking the views of motorists, causing a dangerous condition. The officer issued them summonses for trespass. Their convictions were reversed and all charges dismissed. The plaintiff's claim that their political opponent pressured the chief to have them stop their campaigning. Their action for malicious prosecution under 42 U.S.C. Section 1983 resulted in the award of $78,237 in compensatory damages and $75,000 in punitive damages against Chief Wagner, and $20,000 against Officer Zuppa. After the jury verdict, the judge entered judgment for the defendant's ruling that having to attend pretrial and trial hearings did not constitute a government seizure in a malicious prosecution action predicated on the Fourth Amendment.

The Appellate Court agreed citing Albright v. Oliver, 510 U.S. 266 (1994). The Supreme Court rejected Albright's Section 1983 malicious prosecution claim based on the Fourteenth Amendment's due process clause finding that the appropriate constitutional claim would be found under the Fourth Amendment. "Where a particular amendment provides an explicit textual source of a constitutional protection against a particular sort of government behavior, that amendment, not the more generalized notion of substantive due process must be the guide for analyzing these claims." at 813. In this case the plaintiffs were only issued summonses; they were never arrested, never posted bail, were free to travel, and did not have to report to pretrial services. Their liberty was restricted only during the trial and the Fourth Amendment does not extend beyond the period of pretrial restrictions.

Johnson v. Lindon City Corporation, 405 F.3d 1065 (10th Cir. 2005)

Defendant and off-duty sergeant, Michael Smith, had his mother-in-law temporarily living with him due to medical problems. When the mother-in-law froze the marital bank account, her husband came to the Smith house to question her. When he and his son arrived at the Smith residence to discuss the matter, Smith attempted to move them, which resulted in a fight. Sergeant Smith placed them under arrest and ordered them to wait until an on-duty sergeant arrived. The plaintiffs signed Pleas in Abeyance and executed statements admitting unlawful use of force to do bodily injury to Sergeant Smith and to assault. In exchange the state agreed to dismiss the charges as long as no laws were violated within the next six months. After six months, the plaintiffs sued for false arrest. The Court recognized the plaintiffs' arguments that they had valid reasons for pleading; however, it found that for the plaintiffs to accept the benefits of the program and to sue for civil damages, would clearly undermine the integrity of the judicial system.

SEARCH & SEIZURE

Cummings v. City of Akron, 418 F.3d 676 (6th Cir. 2005)

Responding to a domestic disturbance, Akron officers were informed by the victim that the alleged perpetrator, her boyfriend the plaintiff, was at a neighboring house. The police officers opened an outside screen door, knocked on the inside door and Cummings came to a window. When Cummings came to the front door and personally opened it, one of the officers put his foot in and asked if the boyfriend was inside the house. Cummings said he wasn't and denied the officers' request to enter the home. The officers detected the odor of marijuana and asked about the weed. Cummings immediately attempted to close his front door. The officers pushed the door open and a struggle ensued, resulting in Cummings being struck with fists, batons and sprayed with pepper spray. A third officer arrived and used a taser gun. After securing Cummings, the officers reentered his home and seized marijuana and firearms.

In the criminal proceedings, Cummings pleaded no contest to a charge of misdemeanor assault on one of the officers. Cummings sued the officers for allegedly illegally seizing him, unlawfully entering his home and excessive force. The Appellate Court affirmed the District Court's ruling that the excessive force claim was barred by Heck v. Humphrey. It did not agree that the other claims were barred by Heck.

It was undisputed that the officers had no warrant to arrest Cummings or search his residence when Cummings did not consent to the entry. The other issue was whether or not the officers had exigent circumstances to enter the home. They claimed that when Cummings closed the door on the officer's foot, he was committing a felony assault, which justified the officers entering the home to arrest him. The Court did not agree. Citing United States v. Santana the Court recognized that the key to a hot pursuit is "that a suspect may not defeat an arrest which has been set in motion in a public place by the expedient of escaping to a private place".

In contrast to Warden v. Hayden Cummings did not commit a crime in a public place or attempt to flee into his house and, contrary to Santana, he never fully exposed himself to public view given that he opened the door very slightly and only upon the request of the police. Further, it is highly questionable whether Cummings' act of closing the door on Sherman's foot actually constituted assault, as there was no evidence that he knew the officer's foot was in the door and the officer suffered no injury.

Under Payton and Welsh the officers' seizure of Cummings' person and entry into his home, while unsupported by warrant, consent or exigent circumstances, the officers deprived Cummings of his constitutionally protected right to refuse entry into his home and to be free from an unreasonable seizure of his person.

Leaf v. Shelnutt, 400 F.3d 1070 (7th Cir. 2005)

Deputy Jacobs volunteered to respond to an incomplete 911 call. Upon his arrival at 1:22 am, he found Murphy who told him that he and other apartment dwellers had seen a man breaking a window and, upon approaching him, the man claimed to be an occupant of the apartment. He said the man had been belligerent. After speaking to Murphy and other residents for two or three minutes, Jacobs drove to Leaf's apartment where he observed the patio door open and a window broken. He also saw an ice chest pushed up against the front door, which he claimed burglars sometimes do to obstruct entries to a home. When Shelnutt responded, Jacobs informed him of the known facts and together they entered the apartment. Both officers had their guns drawn and used tactical lights attached to the barrels of their guns to illuminate the apartment. Neither officer knocked before entering but Jacobs testified that he announced from outside the apartment "This is the Marion County Sheriff…come out now…show yourself". They found Leaf lying naked uncovered face up on the bed and Shelnutt conducted a search of the apartment, which lasted approximately three minutes while Jacobs stayed in the bedroom. When Shelnutt returned to the bedroom he illuminated Leaf with his tactical light but did not recall touching him although Jacobs testified that he saw Shelnutt nudge Mr. Leaf. At this point, Leaf jumped up from his bed, lunged at Shelnutt with a fifteen inch Bowie knife. Leaf waved the knife in a figure eight motion approaching Shelnutt who backed up a step or two into the bathroom before firing four shots, killing Leaf.

Entry into the Apartment

The District Court found that there was a question of fact whether Deputy Shelnutt had announced his purpose before entering the apartment. The Appellate Court disagreed. A

warrantless is permissible when police have a reasonable belief that exigent circumstances require immediate action and there is no time to secure a warrant. In this case it was objectively reasonable for the officers to believe that a burglary was occurring and that people inside the apartment were in danger. The Court also noted that it had previously determined that a 911 call itself can be enough to support a warrantless search under exigent circumstance exception, particularly when the caller identifies himself. United States v. Richardson, 208 F.3d 626 (7th Circuit), cert. denied, 2000.

"Knock and Announce" Rule

The court next considered the officers failure to comply with the "knock and announce" rule. In order to justify a no-knock entry, the police must have reasonable suspicion that knocking and announcing their presence would be dangerous, futile or it would inhibit effective investigation of a crime by allowing the destruction of evidence. Citing Richards v. Wisconsin, the Court determined that the officers had a reasonable basis to conclude that knocking and announcing would have been dangerous. Deputy Jacobs had not seen or heard anyone in the apartment for approximately eight minutes of observation and there were signs that someone other than the apartment's last occupant had entered, including the open sliding door, the ice chest against the front door and the forced entry into the apartment. It was reasonable to believe that knocking and announcing could have alerted a burglar, justifying the entry without knocking and announcing.

The Protective Sweep

Although the protective sweep has generally been justified for the search of accomplices, the primary purpose is to ensure officer and bystander safety. This purpose was deemed reasonably necessary in this case as the officers had reason to believe that they might be faced with an ongoing crime or an individual in danger. The three-minute sweep of the apartment to look for persons other than Mr. Leaf, even before they woke Mr. Leaf, was reasonable.

Illegal Seizure

The Supreme Court found in California v. Hodari that "the word 'seizure' readily bears the meaning the laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful". In this case, the officer merely tapped on Leaf's shoulder in an attempt to wake him, which would not constitute a seizure under the Fourth Amendment. Therefore, the officers would be entitled to qualified immunity. Even if there was a seizure, the records reflect a minimally intrusive stop as the officers were lawfully in the apartment and a nudge could hardly be called intrusive.

Baldwin v. Placer County, 405 F. 3d 778 (9th Cir. 2005)

An officer with the Marijuana Eradication Team (MET) applied for a search warrant for the residence of the plaintiffs claiming that a citizen informant, had, on an unknown date, given him information that the plaintiffs were growing marijuana, at an unknown time. The affidavit further stated that the plaintiffs' trash was searched resulting in the discovery of marijuana leaves

and stems recently cut from a mature marijuana plant which was fresh, green and still moist, as well as marijuana seeds, hydroponic grow rock, two black one half gallon pots and rain drip "irrigation equipment".

The plaintiffs claim that the affiant was untruthful and supported their claim with 13 affidavits from individuals whose trash was searched by MET and in each instance the officer made the same claims with regard to finding fresh marijuana leaves. In the instant case, plaintiffs claimed that the only thing in their garbage was paper towels with the remnants of smoked marijuana. All of the other 13 affiants denied having fresh marijuana in their garbage. Defendants claimed that even if these alleged lies were taken out of the warrant, probable cause still existed to substantiate the search. The Court did not agree, finding that the only thing that would be left was the fact that an unidentified citizen, at an unidentified date, told the sheriff's deputies of marijuana growing at an unidentified time plus the presence of a rock and two pots which would not lead any magistrate to authorize a search. The defendants then claimed that the search was objectively reasonable based on the plaintiffs' admission of the burnt marijuana found in the garbage. The Court did not agree finding that the officer's lie was substantial in moving the magistrate and the force of the lies and the mind of the magistrate could not be bleached out.

Hale v. Kart, 396 F.3d 721 (6th Cir. 2005)

The plaintiff asked the police to remove his ex-wife from his home during a birthday celebration when she consumed significant quantities of alcohol and became belligerent. While at the home and while being removed, she informed the officer that her ex-husband had large amounts of prescription medication and cash in his bedroom and was illegally selling prescription medication. The officer contacted a deputy from the county Sheriff's Department who was the lead investigator in a recent prescription drug theft from a local pharmacy. The deputy applied for a search warrant based on the ex-wife's information gathered when she stayed at his residence for approximately two weeks, during which time she witnessed her ex-husband selling the prescriptions, and he gave her vicodin and specific details about the location of the cash and prescription drugs. The search led to the discovery of prescription drugs and $9,500 in currency but no charges were filed against the plaintiff.

The Court found that the affidavit on its face was sufficient. "Affidavits do not have to be perfect, nor do they have to provide every specific piece of information to be upheld". In this case, the affidavit was sufficient on its face describing the probable existence of large quantities of medication and cash in specific locations in the apartment. It identified the basis for the officer's belief. Further, her presence, her identity, how she learned of the information and even the fact that she had been involved in criminal activity by taking prescription drugs, which acts as an additional indicia of reliability amounted to probable cause. The plaintiff's claim that the deputy should have engaged in further investigation does not detract from the sufficiency of the affidavit.

The Court also found that the admissions with regard to the witness being intoxicated, taking drugs and being belligerent were not critical to the finding of probable cause. "Although it is possible that an intoxicated and angry person may be less reliable than a detached and

disinterested observer who is sober, it is equally possible that those same factors can make a witness more inclined to be truthful than he otherwise might be".

McNeal v. Roberts, 129 Fed.Appx. 110 (5th Cir. 2005)

Plaintiff brought a claim against two City police officers relating to a body cavity search after she activated a store security sensor. In her deposition, the plaintiff stated that she told the original officer that she had no objection to being searched and that she had no objection to a female officer being called. She also admitted that she cooperated with the officers and didn't refuse any of their "requests". In view of this evidence, the Court found that the officers were entitled to qualified immunity, as their actions were objectively reasonable under the circumstances.

Harris v. Lee, 127 Fed.Appx. 710 (5th Cir. 2005)

Harris claimed that on two occasions police unlawfully entered his apartment without a warrant, planted cocaine and a firearm, and threatened to beat him and his wife. The Appellate Court affirmed the judgment that both searches were lawful. It found that the magistrate judge did not err in determining that the first search was appropriate under a valid consent. In the second search the Court ruled that the officers had exigent circumstances as the evidence presented at trial indicated that, through the open doorway of the apartment, officers observed Harris jump up from the kitchen table and run to the back of the apartment with a clear plastic bag containing a white powder substance. Most importantly, in both cases the judge determined that the officers' testimony was more credible than Harris'.

San Jose Charter of Hells Angels v. City of San Jose, 402 F.3d 962 (9th Cir. 2005)

Kevin Sullivan was beaten to death at the Pink Poodle Nightclub, by a bouncer who was a member of the Hell's Angels Motorcycle Club. The lead investigator, Linderman, suspected other club members were concealing evidence of murder including an alleged videotape of the incident. After a search of the clubhouse proved unsuccessful, the District Attorney's office sought ten warrants for the search of residents of the Hells Angels. The Sheriff's Office arranged for assistance from multiple law enforcement agencies, including the San Jose Police Department. At 7:00 am, teams of law enforcement officers simultaneously executed the search warrants. Several dogs were killed and virtually truckloads of items were seized during the course of the search that were related to membership in the club. These searches were planned a week in advance and, during the time of the searches, Linderman was available to instruct officers as to what items to take.

Search and Taking of "All" Indicia of Hells Angels Affiliation

The plaintiffs allege that Linderman's instructions to seize every item with indicia of Hells Angels affiliation, including motorcycles, a refrigerator door and numerous other items were unreasonable. Further they claim that the manner in which the warrant was executed caused unnecessary destruction of property, including jack hammering the sidewalk in front of

the Hells Angels club to remove pieces of concrete with the Hells Angels' names on it, the cutting of a mailbox, the breaking of a refrigerator and other unnecessarily destructive behavior.

Linderman's primary defense is that the warrant specified the quantity and kind of evidence to be seized and that he had no power to deviate from the explicit specifications. The Court found this argument to be unpersuasive, as Linderman would have had to read the word "any" in the search warrant to mean "all". The use the word "any" did not mandate that he had to seize everything. Even assuming that Linderman's construction of "any" as "all", he still had discretion over the execution of the search and could leave items that may arguably come within the limits of the warrant. The search warrant gives an officer the power to seize items but does not necessarily require him to do so.

Further, the unreasonable nature of Linderman's instructions to seize all evidence of indicia was highlighted by the destruction of property caused by the seizures. Without citing any law in the specific context of this case, the Court ruled that Linderman was not entitled to qualified immunity as the unlawfulness of his conduct would be apparent to a reasonable officer.

Shooting of the Dogs

The Court affirmed the denial of qualified immunity on behalf of the officers who shot the dogs. The killing of a dog is a destruction recognized as a seizure under the Fourth Amendment. A seizure becomes unlawful when it is more intrusive than necessary. To determine whether the shooting of the dogs was reasonable, the Court balanced the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interest at stake. The interest at stake was significant as dogs are more than just mere property, recognizing the emotional attachment to a family dog. In this case, both entry teams had a week to plan the execution of the entry. The officers had no specific plan for isolating the dogs and did not prepare for alternative means to control or subdue them.

The officers justified three governmental interests to justify the intrusion. The first was the interest accomplishing the goals of the search. The Appellate Court agreed with the District Court that there was insufficient probable cause to believe that either the videotape or the meeting minutes would be found at the residences and, therefore, the only items to be seized based on probable cause was evidence of indicia of Hells Angels Affiliation. The government's interest in these items was greatly diminished because they were seized not to prove a crime but to enhance the sentencing under California law.

The second justification was the need for stealth and speed coupled with the fact that the searches were simultaneous. The Court determined that the shooting of the dogs was unnecessary to preserve stealth because it was the officers' own methods of entering that compromised their ability to effectuate a quiet entry by using a ram to break down the front door. And, in another case, it was not the dogs' barking that woke the residents but the discharge of four gunshot blasts.

Third, the officers argued the justification of safety. The Court stated that safety might have provided a sound justification had the officers been surprised by the presence of the dogs.

However, in this instance they knew the dogs would be present a week before the warrants were served. There was substantial time to develop strategies for immobilizing the dogs. Any entry plan designed brought them into proximity of the dogs without providing any non-lethal means of controlling them. The Court had previously held that the killing of a person's dog constitutes an unconstitutional destruction of property absent a sufficiently compelling public interest. An appropriate factor in determining reasonableness is whether the officers considered alternatives before undertaking intrusive activity implicating constitutional concerns. The Court held that its prior law forbade the killing of a person's dog or the destruction of a person's property when that destruction is unnecessary, i.e. when less intrusive or less destructive alternatives exist.

McClendon v. Story County Sheriff's Office, 403 F.3d 510 (8th Cir. 2005)

The plaintiff contended that officers exceeded the scope of the search warrant when they seized all twenty-three horses that were not sick, weak or malnourished. Over a period of three months officers and animal experts inspected the premises of the plaintiff on reports that the animals were being neglected. Over this period horrific details were described by the Court. The Court held that the defendants did not violate plaintiff's constitutional rights because the horses seized fit the description in the warrant. It held that adjudication of whether items seized fit within the warrant's description "ultimately turns on the substance of the items seized and not the label assigned to it". The warrant authorized the seizure of any horses in immediate need of critical care. It further defined what this meant. The officers relied on professional opinions whose statements established a clear nexus between the horses seized and the warrant description. Officers executing a search warrant are not obliged to interpret it narrowly. The concept of a "narrow construction" is a convention of legal jurisprudence and would be an unworkable demand to place upon law enforcement and the experts with whom they consult.

FAILURE TO PROTECT

Kennedy v. City of Ridgefield, 411 F.3d 1134 (9th Cir. 2005)

Kimberly Kennedy claims that she reported to Officer Shields that Michael Burns, a 13-year old neighbor, molested her 9-year old daughter. She reported that the Burns family was unstable and specifically described evidence of their violent nature, in particular in regard to Michael. She reported the fights at school, lighting a cat on fire, breaking into his girlfriend's house and attacking her with a baseball bat, and throwing rocks at a building downtown. She claims that Shields assured her that she would be given notice prior to any police contact with the Burns family. Kennedy alleged that, on several occasions, she inquired as to the status of the investigation and reminded Officer Shields to notify her prior to any contact with the Burns family. She expressed concerns about her safety and told child abuse intervention officers handling the investigation that she was anxious to have the investigation started.

Eighteen days after the initial complaint Shields, responding to a telephone message from Kennedy as to the status of the investigation, went to the Burns residence and informed them of the complaint. He then went to Kennedy's house to tell her that he had told Angela Burns of the molestation allegations. Kennedy claims that Shields told her that Angela Burns was very angry and that Angela and Michael began yelling at one another. Kennedy became upset and asked

Shields why he informed Burns before notifying her. She feared for her safety but was assured by Shields that police would patrol the area around her and Michael's house to keep an eye on him. Relying on this promise, the Kennedys stayed at home, intending to leave the next day. In the early morning of the next day, Michael Burns broke into the Kennedy house and shot Mr. and Mrs. Kennedy while they slept. Mrs. Kennedy's husband died as a result of his injuries.

The Court denied Shields motion for summary judgment because "a jury could find that Officer Shields unreasonably created a false sense of security in the plaintiffs by agreeing to give the plaintiffs advance notice of advising the Burns family of the allegation that Michael Burns sexually molested Tera Teufel, and assuring the plaintiffs of a neighborhood patrol.

The Court first found that Shields violated Kennedy's constitutional rights under the "state-created danger" doctrine. It found that Shields' affirmative actions placed the Kennedy family in a situation of danger greater than they would have faced if he had not acted at all. There was no dispute that notifying Burns of the allegation triggered the action. After promising the Kennedys that he would notify them before such notification to the Burns, Shields created a situation of heightened danger. If the Kennedys had received the prior warning, they could have taken additional precautions. In addition, Shields increased the danger by offering false assurances that the police would patrol the Kennedys' neighborhood the night of the shooting.

In support of deliberate indifference, the plaintiff's evidence included knowledge by Shields that the Kennedys feared for their safety, knowledge of Michael's violent tendencies and Kennedy's comments to Shields on the night of the attack informing him that he had placed her family in danger by telling the Burns family of the allegations prior to notifying the Kennedys. Under these circumstances, the obvious consequence of informing Burns prior to the Kennedys and falsely assuring Kennedy of police protection increased the risk the Kennedy family faced from Michael Burns.

Finally, relying on prior precedent in which a verbal promise was relied upon but not kept, the Court determined that the law in the circuit was clearly established. In L.W. v. Grubbs, 974 F.2d 119, a registered nurse was promised that she would not be left alone with violent sex offenders. She was on the night of the incident left with a young male inmate who raped and terrorized her.

Torres-Rivera v. O'Neill-Cansell, 406 F.3d 43 (1st Cir. 2005)

In response to the taunting by two children who were shouting obscenities at officers who were writing traffic tickets, one uniformed officer, Espada, and one in plain clothes, O'Neill approached plaintiff. Allegedly, 18-year-old Coram was not one of the youths yelling at the officer, but was beaten by Espada with his nightstick. Cora's mother, who tried to intervene, had a gun pointed at her by O'Neill. The officers did not file a report on the incident. Espada was convicted of criminal assault and battery. In the civil suit, O'Neill's defense was to blame Espada. The jury found Espada liable for excessive force and O'Neill liable for failing to intervene.

At trial the plaintiff's case on failure to intervene was predicated on two theories. First, officers have an affirmative duty to intervene arising from being present at the scene, when they are aware by excessive force by another officer, and have the ability to stop it. Second, officers have a constitutional duty to intervene when they are instrumental in assisting the actual attacker or aggressor in placing the victim in a vulnerable position.

On appeal, O'Neill challenged the District Court's instruction, for failing to instruct the jury on all of the elements of the failure to intervene claim, which would have limited damages. The argument was premised on the theory that the damage award would have been less because O'Neill did not have time to prevent Espada from the initial blow to the plaintiff's genital area, which resulted in the greatest injury. The Appellate Court found that the judge did not err on elaborating on his instruction that O'Neill must have a realistic opportunity to prevent the other officer's actions.

"Law enforcement officers, sometimes have an affirmative duty to intervene, which is enforceable under the due process clause. For example, an officer who is present at the scene of a detention of an arrest, who is aware or what is going on, and fails to take reasonable steps to protect the victim of another officer's use of excessive force, can be held liable under Section 1983 of the civil rights act for his nonfeasance, provided that that officer, the onlooker officer had a realistic opportunity to prevent the other officer's actions."

Gray v. City of Detroit, 399 F.3d 612 (6th Cir. 2005)

Gray was arrested for breaking into his brother's rental property and attempted to hit him with a metal pipe. The following morning, while in his cell, he began talking loudly and ranting. He ripped the telephone from the wall and broke the sink and toilet. He complained of chest pains and was removed to a cell in a receiving hospital. At about 6:35 pm, he was heard banging on his cell door and yelling in an agitated state. Officers handcuffed his hands behind his back, having previously placed him in leg irons. At approximately 7:30 pm, an officer found Gray hanging by his cell hospital gown, having slipped his handcuffs in front of his body. In jail suicide cases, the inquiry concerning liability of the City and its employees is whether the decedent showed a strong likelihood that he would attempt to take his own life in such a manner that failure to take adequate precautions amounted to "deliberate indifference to the decedent's serious medical needs". Because Gray's conduct did not give rise to a constant duty to screen or monitor him for suicide, there is no evidence that officers violated his constitutional rights.

With regard to municipalities, case law imposes a duty to recognize or at least not ignore obvious risks of suicide that are foreseeable. Where the risk of suicide is clear, a municipality has a duty to take reasonable steps to prevent suicide.

The plaintiff's expert concluded that the policies were adequate but their implementation and enforcement were deficient. It is possible that if officers had conducted a thorough screening for suicidal intent or kept a closer watch on Gray, this suicide may have been prevented. However, pre-trial detainees do not have a constitutional right that requires cities to take every possible measure to prevent suicidal efforts. Detainees do have a right to policies, training and discipline, which do not result in deliberate indifference to foreseeable and

preventable suicide attempts. In this case, the plaintiff never made any statements that could have been interpreted as threatening to harm himself and his destructive acts were not self-directed.

The plaintiff presented documentation of twenty in-custody deaths over an eight-year period prior to Gray's death. Only two of these were suicides and defendants countered with testimony that using existing procedures, officers had been successful in preventing eight suicide attempts in the past twenty years. There were also two official reports as evidence of the deliberate indifference to the needs of the prisoners; however, the allegations were that the City failed in providing medical care, not the more narrow duty to prevent foreseeable suicides.

Bradich v. City of Chicago, 413 F.3d 688 (7th Cir. 2005)

Bradich was arrested on a warrant for driving while intoxicated. This was his 24th arrest. He hung himself 90 minutes after being booked. The court affirmed the summary of judgment for the arresting officers and found that the lockup keepers did not display deliberate indifference to a substantial risk of suicide by putting Bradich in a regular cell and allowing him to keep his civilian clothes. He had never attempted to injure himself, did not have a mental health history, and the fact that there had been two unsuccessful suicide attempts during the previous month did not imply that Bradich posed any elevated risk of suicide.

As for the city, the court found that its policies were sound and the allegation that one of the guards had not been retrained or that others were playing cards and watching television instead of watching the monitors may have demonstrated a shortcoming in the enforcement of sound policies, but was not an independent constitutional violation. The court denied summary of judgment in finding that a jury could find deliberate indifference if it believed the plaintiff's claims that the officers unnecessarily waited ten minutes before calling paramedics and took steps to cover up misconduct rather than providing medical attention. The factual allegations supporting these claims were that the only officers trained in CPR, who were not performing it, shouted, slapped, and shook Bradich. The plaintiffs also claimed that the officers changed, erased, or rearranged other entries in the logbook instead of providing medical attention. The state further suggested that the officers disposed of the actual ligature based on medical personnel's statement that Bradich was wearing a t-shirt that the lockup keeper said had been used as ligature. And that the officers had hidden the fact that Bradich was allowed too much clothing (three t-shirts) and other forbidden things in his cell.

Garretson v. City of Madison Heights, 407 F.3d 789 (6th Cir. 2005)

Garretson claimed that the city and various officers denied her medical treatment. She argued that Madison Heights had an unwritten custom of not providing medical attention to pre-trial detainees prior to arraignment. The Court affirmed summary judgment in favor of the city, finding first, that there was no evidence that the city or its police department had a custom of denying medical treatment to arraignment detainees. Second, there was no evidence that the city had notice of a clear and persistent pattern of such treatment, demonstrating the existence of a policy of inaction. Finally, there was no evidence that the city was the moving force behind Garretson's injuries.

In order to find the individual officers libel for deliberate indifference to the plaintiff's medical needs, she must show both subjective and objective components. The objective component requires a showing that the alleged deprivation is sufficiently serious. In order to do so, she must present verifying medical evidence to establish the detrimental effect of the delay of providing her with medical attention. Garretson is a diabetic whose condition required insulin injections at regular intervals. Because she did not receive these treatments while housed in the jail, she was later admitted to a hospital for several days. This evidence was sufficient to show a serious medical need.

Garretson also had to show that the officers subjectively had a sufficiently culpable state of mind in denying her medical care. Deliberate indifference requires that the officers knew of and disregarded a substantial risk of serious harm to her health and safety.

The Court affirmed summary judgment on behalf of one officer, as plaintiff was unable to show that he had any knowledge of her diabetic condition. She also sued a detective who interviewed her but the evidence indicated that he had no prior notice of her insulin dependence or her deteriorating condition during the interview, and that immediately after she notified him of her condition he obtained emergency medical aid for her.

The Court denied summary judgment on behalf of the initial officer who originally booked her as she claims she informed him that she required insulin for her condition and that she was past due. The Court also denied summary judgment on behalf of the officer who escorted her to her holding cell as she claims she told him of her medical needs. Both officers were allegedly aware of facts from which the inference of substantial risk of harm could be drawn; therefore, there was a genuine issue of material fact as to whether these officers acted with deliberate indifference to Garretson's medical needs.

Owensby v. City of Cincinnati, 414 F.3d 596 (6th Cir. 2005)

During a violent struggle with the plaintiff, Cincinnati officers called for assistance resulting in the response of officers from the Village of Golf Manner. Prior to the Golf Manner officers responding, it is alleged that Owensby was placed in a "head wrap and 'mandibular' angle pressure point compliance technique." It is further alleged that after being handcuffed, he was sprayed twice in the face from a distance of six inches in violation of department policy. He was carried to the Golf Manner cruiser and placed handcuffed and possibly unconscious in the back seat. Another officer arrived and observing the plaintiff with his flashlight, noticed that he was bleeding and appeared unable to breath. Another officer arrived and his cruiser's video camera recorded all of the subsequent activity. At least eleven Cincinnati officers and two Golf Manner officers were either on the scene or in the immediate vicinity, three of whom were trained emergency medical technicians, yet no officers attempted to provide medical care to Owensby. Approximately six minutes after being placed in a cruiser, a sergeant arrived, checked Owensby, who appeared not to be breathing, at which point he was removed from the cruisers, given CPR, and emergency medical technicians were summoned. The medical examiner ruled his death a homicide, resulting from asphyxiation during restraint attempts.

The court found sufficient evidence of deliberate indifference to deny the officers qualified immunity. Each officer knew and disregarded a substantial risk to Owensby's health and safety. There was sufficient evidence to indicate that each viewed his physical distress, yet made no attempt to summon or provide medical care, until several minutes later. The court noted that while medical proof may be necessary to assess whether the denial of medical care caused the serious medical injury in cases where the prisoner affliction is seemingly minor or not obvious, such evidence is required since the individual had a serious need for medical care that was so obvious that even a layperson would easily recognize the necessity for a doctor's attention.

Sheeler v. City of St. Cloud, Minn., 402 F.3d 826 (8th Cir. 2005)

Police concluded that Sheeler died of an accidental, self-inflicted gunshot wound to his head while playing Russian roulette with two friends. Sheeler's parents believed that their son was the target of a gang hit and his death was a homicide. After unsuccessfully trying to sue the parties they believed were responsible, the Sheelers brought a civil rights claim alleging that the defendants denied them meaningful access to the courts by failing to properly investigate their son's death.

The court began its analysis by citing Wilson v. Lawrence County, 260 F. 3d. 946 (8th Cir. 2001) in which the court determined that an allegation of denial of due process rights for failure to properly investigate a homicide case required a showing that the actions of the officers "shocked the conscience." Applying the same standard to the Sheeler's right to access to the courts claim, the court found that they must show deliberate indifference in the investigation. In order to support their deliberate indifference claim the plaintiffs pointed to a failure to perform an autopsy or test the apparent blood spatters on their son's hands. They also presented a report from the crime victim's ombudsman, which chastised the police for not immediately treating the scene as a crime scene and violating its own department policies. The court found this evidence insufficient to establish deliberate indifference. In this case there were no outstanding discrepancies to clear up through additional forensics testing and all signs pointed to a gun accident, which was confirmed by each step of the investigation. Returning to the ombudsman's report, the court found "alleged violations of state laws, states-agency regulations, and even state court orders do not by themselves state a claim under 42 U.S. Code Section 1983.

MUNICIPAL/SUPERVISORY LIABILITY

Roberts v. City of Shreveport, 397 F.3d 287 (5th Cir. 2005)

Officer Rivet was escorting a woman and child across the street while working in an off-duty capacity as a crossing guard and wearing his police uniform. He signaled Carter to slow down and ended up on the hood of Carter's vehicle. Rivet struck Carter's windshield twice with his service revolver and ordered him to stop. Carter, cursing, applied the brakes, then gas, apparently trying to throw Rivet off the vehicle. As he was falling, Officer Rivet fired a single shot, killing the driver. The jury found that the officer used excessive force but that his conduct was objectively reasonable in light of clearly established law.

The Chief of the City moved for summary judgment, which was denied. On appeal, the Court held that the municipality and the Chief in his official capacity could not raise immunity defenses on interrogatory appeal. However, they did have jurisdiction to review the denial of summary judgment on the basis of the Chief's individual capacity.

The plaintiff claims the Chief failed to train officers alleging three deficiencies: 1) the Chief's program failed to train officers for crossing guard duty without resorting to deadly force; 2) that officers were not trained as mandated by Tennessee v. Garner; and 3) that the training program did not teach officers the correct meaning of the term "deadly force". The Court rejected these allegations.

1) The claim relating to crossing guard duties failed as the Court noted that plaintiffs cannot prevail by stating their complaints about the specific injury suffered as a failure to "train claim". "In City of Canton, the Supreme Court specifically warned against this type of artful pleading". "Neither will it suffice to prove that an injury or accidentcould have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct";

2) The plaintiff offered deposition testimony of the current Chief and Head of Internal Affairs in which neither was able to recall the exact standard mandated by Tennessee v. Garner. The Court noted that testimonial embarrassment of two supervisors does not prove inadequacy of the police department's training on deadly force. Overwhelming evidence was provided showing that there was a comprehensive policy on the use of deadly force and that all officers undergo training, as compelled by Tennessee v. Garner (Affidavit of Certified Police Instructor);

3) Plaintiff provided claims of past incidents in which Officer Rivet pointed his firearm at unarmed African-Americans during routine traffic stops. The Court determined that the officer's alleged propensity for displaying his firearm was fundamentally different from a propensity to use deadly force. Although such actions reflect badly on the officer's judgment, it proved nothing about his actual use of deadly force nor was it relevant as to whether the Chief was on notice that the officer might use excessive force when confronted with a speeding vehicle while directing traffic;

4) Plaintiff provided evidence of another incident in which Officer Rivet used deadly force. That case was dismissed showing, if anything, that Officer Rivet acted in conformity with the substantial training he received on the use of deadly force;

5) Plaintiff submitted newspaper articles on claims about unconstitutional deadly force. Newspaper articles are classic inadmissible hearsay and, even if these two incidents were proven, they would not be sufficient to show a pattern of unconstitutional activity;

6) Plaintiff claimed that this case fit within the narrow scope of the "single incident" exception, enunciated in Bryan County v. Brown. Under this exception, the plaintiff must prove that the "highly predictable consequence of a failure to train would result

in the specific injury suffered, and that the failure to train represented the moving force behind the constitutional violation". Unlike Brown in which the Sheriff hired one of his relatives who had multiple prior arrests and convictions and other reckless behavior who was working with no training, the Chief in this case oversaw significant training regimen for Officer Rivet and the other police officers under his command, and there was no evidence that Rivet had been involved in any cases involving improper use of deadly force.

Young v. City of Providence, 404 F.3d 4 (1st Cir. 2005)

A case involving the shooting death of an off-duty police officer, the Appellate Court affirmed the District Court's grant of summary judgment in favor of the City on the Deficient Hiring claim, but reversed the Court's grant of summary judgment on the Failure to Train claim. Providence had, an always armed, always on-duty policy, instructing officers that they shall act if they become aware of an incident that requires immediate police action and time is of the essence to safeguard life or property.

If officers become aware of an incident that requires police action and life or property is not endangered, then they should report the incident to the appropriate agency for action.

Training Requirement:

The Court described testimony from use of force trainers that claimed to involve off-duty/on-duty issues relevant to the policy, however, there was no documentation of this training and other witnesses testified that no pertinent training took place. Because only Solitro was found to have violated the plaintiff's constitutional rights, the court stated that any proper allegation for failure to train must be aimed at Solitary's lack of training and that such deficiency cause him to take action that were objectively unreasonable and constituted excessive force on the night he shot Cornell. Based on the evidence presented, the jury could find that there was, at best, very minimal training on the issues in question, and no real program of training on them at all. To prove failure to train without a pattern of previous constitutional violations it must be shown that a violation of a federal right is a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations. (Citing Brown v. Bryan County) the Court found that a jury could find that the department knew that three was a high risk that absent particularized training on avoiding off-duty misidentifications, and given the department's always armed/always on-duty policy, friendly fire shootings were likely to occur. A jury could also conclude that the severity of the consequences forced the department to take notice of the high risk despite the rarity of such an incident. This was further supported by the expert's testimony concluding that the risk of friendly fire shootings was common knowledge within the police community and that it was common knowledge that particularized training on on-duty/off-duty interactions, particularly misidentifications, was required to lessen this risk. A jury could find that the training would have made a difference here, where an officer is evaluating the threat level of an unknown individual armed with a gun and where officers in such circumstances fall back on their training. Silatro, if adequately trained, would not have shot Cornell.

As to the Deficient Hiring claim the court affirmed the summary judgment concluding that even if the screening procedures were inadequate because background investigators were not trained and background checks were not received by the oral board, this would be insufficient to prove deliberate indifference especially in light of the fact that a background investigation was conducted on Silatro who received good references. The fact that Silatro's record included several complaints of excessive force while restraining juveniles (while working at a juvenile correction facility) and an expunged conviction for assaulting an off-duty minority officer, such evidence was insufficient to prove deliberate indifference.

The Court also vacated summary judgment on behalf of the supervisors, as there was insufficient record to affirm the summary judgment in their favor.

McCully v. City of North Richmond Hills, 406 F.3d 375 (5th Cir. 2005)

During the execution of a no-knock search and arrest warrant officer Hill shot and killed Davis. Hill was the first swat team member to enter the home and shot Davis within two seconds of the entry. According to the Plaintiffs, Davis was unarmed, had his arms outstretched, and repeated don't hurt us. According to the officers Davis was pointing a gun at Hill. The Appellate Court's opinion concerned summary judgment of Hill's supervisors who were sued for inadequate supervision and training. Plaintiffs claimed the supervisors knew that Hill was prone to use excessive and/or deadly force without cause, had a reputation for displaying lewd and criminal behavior while on and off duty, and that his employment history branded him as dysfunctional and unfit for police work.

The Court found that the supervisors were entitled to summary judgment as there was no conduct from which it could reasonably be concluded that they made a serious or deliberate conscious choice to endanger Constitutional rights.

First, the claim that Hill exposed himself during a swat team photographic session and at other times earning him the nickname of "Penie," while improper did not involve excessive force with a deadly weapon resulting in harm to a citizen.

Second, the complaint by a citizen who Hill stopped for a motor vehicle violation who complained that Hill was a rogue cop who behaved "like a psycho" and was "going to kill somebody," was also immaterial as there was no evidence that Hill had previously improperly displayed his weapon to a third party or used excessive force and the Court had recently held that a habit of displaying a firearm during traffic stops did not constitute a relevant pattern with respect to using deadly force during a traffic stop.

Third, Hill's inappropriate use of his gun during training, which involved a mock setting similar to the situation in which Hill shot Davis, was found not to put the supervisors on notice of his propensity because it was a training exercise and no one's constitutional rights were violated. The Court was reluctant to place too much emphasis on mistakes during training wary of creating incentives to conduct less training so as to minimize the chance that a subordinate will make a mistake that ultimately could be used against him. Also, the Court seemed to

suggest that mistakes are made during training and that occasionally adequately trained officers make mistakes.

Finally, there was a claim that a background report indicated that Hill "comes off too aggressive at times". There was no evidence that the supervisors were aware of this report, and no evidence to impute this knowledge to them. Turning back to Brown v. Bryan County, the Court recognized that it had found liability for a single incident where the county failed to provide any training or supervision for a young, inexperienced officer with a record of recklessness. In this case they noted there is a difference between a complete failure to train and a failure to train in one limited area.

Tanberg v. Sholtis, 401 F.3d 1151 (10th Cir. 2005)

After working at a balloon festival, the two women plaintiffs spent approximately three hours at a bar before deciding to take a walk in a public park after 2:00 a.m. At approximately 2:30 a.m., Officer Sholtis, who was off-duty, arrived in the park in a marked police car, dressed in uniform. After deploying his emergency lights and public address system, several teenagers left the park. Then Officer Sholtis watched the plaintiffs walking rapidly away from him. After a second announcement, Ms. Ortega walked toward the patrol car, but Ms. Tanberg attempted to hide beyond some trees. Due to the uncooperative behavior, he ordered both women to sit down in front of the patrol car, but neither did. He identified himself as an officer and instructed Ms. Tanberg to sit down so he could put on handcuffs, but she refused and began to walk past him. He then used a "face down stabilization technique" to force her to the ground and then handcuffed both women. Ms. Tanberg sustained an avulsion fracture to her right arm. Both women were charged with resisting arrest, disobeying a police officer and being in a park after closing.

At trial, the Court directed a verdict on the false arrest claim. The plaintiffs argued that the officer's main reason for arresting them was their failure to obey his commands and not their presence in the park. The Court noted that this theory would be tenable if the lawfulness of the arrest depends on whether the arresting officer had a defensible primary motivation for making an arrest. Since probable cause and not the officer's motivation is the relevant issue in a false arrest claim, and the court determined that the arrest for being in the park after dark was lawful, the plaintiffs' argument failed.

The plaintiffs also argued that Officer Sholtis violated the department's policies, supporting this false arrest action. The department's policy provided that an off-duty police officer may make an arrest only when, "there is an immediate need for the prevention of a crime or apprehension of a suspect." Since, again, existence of probable cause lead to compliance with policies, is what makes an arrest valid. The Court also rejected this claim.

DiRicco v. City of Quincy, 404 F.3d 464 (1st Cir. 2005)

At 1 am DiRicco pulled into his parents' driveway after failing to stop at a stop sign. A police cruiser pulled in behind him. DiRicco claims that he said, "private property" and that Officer McNeil responded, "I don't care….I want your license and registration". DiRicco claims

that McNeil pushed him to the ground, drove his face into the pavement, then picked him up and started banging his head against the cruiser. DiRicco also claims that he told the backup officer and the booking officer that McNeil beat him up.

McNeil claims that DiRicco told him to, "get the [expletive] off private property". He further claims that when DiRicco made a gesture to go inside his vehicle, he told him to stop as he saw hockey sticks and lost sight of DiRicco's hands. He grabbed DiRicco to handcuff him but the plaintiff fell to the ground and, after an intense struggle, was handcuffed. He was taken to a hospital for treatment and then to the police station for booking.

The City's written policy regarding force stated in relevant part that "use of force was permissible only to overcome resistance" and that "force [was to be used] only in the least amount necessary". The first jury could not agree on a verdict and the case was retried, resulting in a verdict in favor of McNeil on all counts. The plaintiff appealed and the motion for judgment as a matter of law was granted to the City.

The Plaintiff argued that the District Court erred in dismissing his Section 1983 claim because there was sufficient evidence creating a triable issue as to whether the City was liable for failing to train, supervise and discipline McNeil. The Court affirmed the dismissal as to training based on evidence that the City regularly gave McNeil copies of its policy on use of force and provided him with formal instruction.

With regard to the failure to supervise and discipline, the plaintiff relied on a single prior case. At trial, the plaintiff attempted to produce evidence of a prior traffic stop of an individual named Burke who allegedly was stopped for a motor vehicle violation, arrested and brought to the police station with a bruised eye and a broken arm, claiming that his injuries were caused by McNeil. He complained that no one would help him file a report. When a letter was sent to him with a complaint form, it was returned, as Burke no longer lived at that address. The evidence was excluded under Rule 404(b), which provides that "evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith". In order for a prior act to be admitted, "it must have special relevance to an issue in the case such as intent, knowledge or absence of mistake or accident, and must not include bad character or propensity as a necessary link in the inferential chain". Also, the probative value of the evidence must be "substantially outweighed by the danger of unfair prejudice". The Court ruled that the evidence could not have had much probative value in that it related to a single, unsubstantiated claim of excessive force.

The Court found that, although the City did not increase its supervision over or discipline McNeil after the Burke claim, the evidence did not indicate its decision to reflect deliberate indifference. The City simply opted not to take action against McNeil after receiving a single, unsubstantiated of use of excessive force.

Mercado v. City of Orlando, 407 F.3d 1152 (11th Cir. 2005)

The Court found that a supervisor who ordered an officer to use a less lethal projectile could not be held liable because the supervisor was in another room during the incident, did not

see the officer aim or fire the gun, and did not tell the officer to fire the Sage Launcher at the suicidal person's head. Further, the officer was trained in the proper use of the weapon, department guidelines prohibited firing at a suspect's head or neck except in deadly force situations, and there is no evidence that the officer had used similar excessive force in the past.

With regard to the claims against the City of Orlando, the only evidence supporting a Monell claim was that Mercado's sisters were allegedly told by Officer Burgos that officers were trained to shoot people in the head. The District Court upheld the finding that this was inadmissible hearsay. The Court also upheld the ruling precluding the plaintiff from presenting the list of other cases involving excessive use of force, as he could not show that any of them involved factual situations that were substantially similar to the case at hand.

With regard to Negligent Training, the court found that although Orlando could be held liable for negligent implementation or operation of the training program, they could not be held liable for the content, as this would be a discretionary function for which the City would be entitled to sovereign immunity.

Finally, the Court referred to the Negligent Supervision claim involving negligent retention, which has been recognized in Florida under case law finding that an employer cannot knowingly keep "a dangerous servant on the premises which defendant knew or should have known was dangerous and incompetent." In this case the plaintiff had no factual support that either of the officers had harmful propensities or were otherwise unfit for service.

Stewart v. City of Middletown, 136 Fed.Appx. 881 (6th Cir. 2005)

The City of Middletown purchased a one-week rental of a FATS system with a return-fire component. The City operated the system twenty-four hours a day. Lieutenant Jeffery volunteered to be an instructor. The party's dispute was whether Lieutenant Jeffery told Officer Stewart to wear safety glasses before he fired either a rubber bullet or a foam ball, striking Stewart, resulting in permanent injury to his eye. Officer Stewart alleged a violation of his Fourth Amendment right to be free from unreasonable seizure. The Court cited a number of cases, including Brower v. County of Inyo which held that, in order for a seizure to occur, the detention or taking must be willful, not the result of unintended consequences of government action. In this case there was no evidence to show that either the City or Lieutenant Jeffery intended to seize Officer Stewart. Officer Stewart unsuccessfully attempted to apply Jensen v. City of Oxnard in which a supervisor shot and killed a fellow officer during a SWAT team operation. In that case, the sergeant fired at his fellow officer intentionally believing that he was an armed suspect.

In addition to the factual circumstances in this case which showed that the Lieutenant's actions were clearly negligent as opposed to intentional, Stewart, in his allegations, claimed that his injury was a direct and proximate result of the callous indifference and reckless disregard of Lieutenant Jeffery for failing to warn or protect Stewart. The complaint did not allege that the Lieutenant's actions were intentional. Absent an intentional seizure supporting a Fourth Amendment constitutional claim, the City was also entitled to summary judgment.

Schroder v. City of Fort Thomas, 412 F.3d 724 (6th Cir. 2005)

Parents of a child who was killed by a speeding motorist sued the city for failing to lower or enforce the speed limit after being informed on multiple occasions of the speeding and numerous requests that the speed limit be lowered. Citing DeShaney and Castle Rock, the court found that this matter did not fall within either the custody or state-created danger exceptions.

While it was true that the plaintiff's claim that the city exhibited deliberate indifference in the face of their warnings, this was not sufficient to prove a due process violation. "It is in the very nature of deliberative bodies to chose between and among competing policy options, and yet a substantive due process violation does not arise whenever the government's choice prompts a null risk to come to pass. For in one sense, it could be said that all governing bodies act with deliberate indifference when they consider rejecting a traffic-safety proposal of this sort that comes with known risks—because the accepted premise of all speed-limit debates is that lower speed limits will lead to fewer accidents and fewer traffic fatalities. Many, if not most, government policy choices come with risks attached to both of the competing options, and yet 'it is not a tort for government to govern' by picking one option over another."

MISCELLANEOUS

Fifth Amendment

Murray v. Earle, 405 F.3d 278 (5th Cir. 2005)

The 11 year-old plaintiff claimed her Fifth Amendment rights were violated when detectives unlawfully interrogated her for the murder of a two-year old child. A criminal defendant's constitutional rights are violated "if his conviction if based, in whole or in part, on an involuntary confession, regardless of its truth or falsity". The constitutional privilege of self-incrimination adheres in juvenile court just as it does in ordinary criminal court; in fact, states must take greater care to protect children against coerced confessions during police interrogations.

The Court first determined that the plaintiff was in custody. She had been involuntarily removed from her home, housed by the state for three days, not informed that she was free to leave and questioned by two police detectives in a closed interrogation room.

The Court next determined that her confession was involuntary. She was 11 years old, had no experience with the criminal justice system, had been held in custody of the state for three days, was unaccompanied by any parent, guardian, attorney or other friendly adult and was found to have below normal intelligence. It cannot be said that she knowingly and voluntarily waived her rights as, outside of having her sign a Miranda card, the police took no precautions to ensure her voluntary statement. They made no effort to contact her adoptive parents or persons at the shelter where she was staying, never told her she was free to leave or call her adoptive parents or friendly adult, and represented that they had already talked to everyone in her family, and that everyone knew what had happened and she could help her family by telling the truth.

Despite the fact that the officers took an involuntary confession from the plaintiff, a trial judge twice heard all the evidence concerning the circumstances surrounding the confession and twice admitted it into evidence. The Court reviewed other circuits' case law addressing proximate cause when a plaintiff's injury results in an independent decision maker's ruling. Some courts hold that an individual is libel for the reasonably foreseeable consequences of their actions while others hold that an intervening decision of an informed, neutral decision maker breaks the chain of causation. The Court determined that in the Fifth Circuit "an individual who provides accurate information to a neutral intermediary, such as a trial judge, cannot cause a subsequent Fifth Amendment violation arising out of the neutral intermediary's decision, even if the defendant can later demonstrate that his or her statement was made involuntary while in custody".

Extraordinary Circumstances Defense

Lawrence v. Reed, 406, F.3d 1224 (10th Cir. 2005)

The plaintiff sued the Chief of Police for ordering the seizure of more than seventy vehicles from her property. The Chief attempted to defend his position, claiming that he received advice from the city attorney and was relying on the pound's derelict vehicle ordinance. The Chief did not challenge the District Court's finding that he violated the plaintiff's Fourth and Fourteenth Amendment rights. The Court found that neither exigent circumstances nor special needs justified the warrantless seizure of the plaintiff's vehicles, and that the derelict vehicle ordinance violated due process because it allowed the city to deprive the plaintiff of her property without a hearing. The question on appeal is whether extraordinary circumstances excused the Chief's knowing clearly established law. The Court cited prior precedent on the consultation with the city attorney. In evaluating such defense, the Court looked at four factors: 1) "how unequivocal, and specifically tailored to the particular facts giving rise to the controversy, the advise was"; 2) "whether complete information had been provided to the advising attorney(s)"; 3) "the prominence and competence of the attorney(s)"; and 4) "how soon after the advice was received the disputed action was taken". "Outside of these four factors the Court found it particularly significant that the Chief and city attorney never once discussed the applicable constitutional law governing the Chief's conduct". The Chief conceded that a warrant or notice and hearing are required before depriving a citizen of his property yet argues that his consultation with the city attorney who never discussed the warrant or notice or hearing prevented him from knowing that these procedures were constitutionally required. The Court found the Chief's defense unavailing as he failed to point to something in his consultation with the city attorney that prevented him from knowing the law.

As a general rule, an officer's reliance on a state statute, regulation or official policy that explicitly sanctions the conduct in question will absolve the officer from knowing that his conduct was unlawful. This principle does not apply where a statute authorizes conduct that is "patently violative of fundamental constitutional principles". The factors used to determine when reliance on a statute is reasonable are: 1) "the degree of specificity with which the statute authorized the conduct in question"; 2) "whether the officer in fact complied with the statute"; 3) "whether the statute has fallen into desuetude"; and 4) "whether the officer could have reasonably concluded that the statute was constitutional". In this case Reed should have known

that the ordinance was unconstitutional because it failed to provide any hearing, pre or post property deprivation. Because a hearing is a fundamental requirement of due process, Reed should have known that the ordinance was obviously unconstitutional. The Court did note that, under circumstances where an officer relies on advice of counsel that demand a snap decision in the face of uncertainty, they will be given more latitude. Here, there was no need for a quick decision.

Property

Moore v. Carpenter, 404 F.3d 1043 (8th Cir. 2005)

Jackson attempted a self-help repossession to recover a boat, motor and trailer, which he claimed Moore had failed to fully pay for. Moore's wife resisted and called the police. Upon responding, Moore's wife was screaming and stating that Jackson had assaulted her. Jackson told the officers that Jackson was behind on his payments and he was repossessing the property. Moore showed the officers a court order indicating that they owed Jackson no money but the fill-in-the-blank judgment did not refer to a boat, motor or trailer. The officers ran a license plate check on the boat and learned that Jackson held the boat's title. They charged Jackson with assault, property damage and trespass and told him to leave the premises. Jackson took the boat with him. Moore alleged that the officers took his boat without permission.

The Court concluded that the officers were not so involved in aiding the repossession that the deprivation of the boat is state action. They were not asked to accompany Jackson to the repossession but were called by Moore to resolve a breach of the peace. By that time Jackson had gained access to the boat and was already in the process of repossessing it. The officers did not tell the Moores the repossession was legal or that they would be arrested if they interfered. It could not be found under the facts that the officers helped Jackson to the extent that the repossession would not have occurred before their assistance. In this case the officers were required to make a close decision in the midst of a repossession fracas. They had good evidence that Jackson had an ownership interest in the boat and needed to defuse a volatile situation, which resulted in one of the parties possessing the property when the public peace was restored.